12/13/02

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.	:	CASE NO. C-1-01-528
Plaintiffs	:	(Judge Spiegel)
vs.	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.	:	
	:	
Defendants		

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTION
TO MAGISTRATE JUDGE SHERMAN'S SEPTEMBER 3, 2002
REPORT AND RECOMMENDATION

Plaintiffs respectfully posit to this Honorable Court that Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D.'s Objection to Magistrate Judge Sherman's November 20, 2002, Order denying said Defendants' Motion to Consolidate is without merit and should be overruled. In support hereof, Plaintiffs represent to this Honorable Court that Magistrate Judge Sherman's analysis of the applicable law is well-reasoned in regards to his ruling. He clearly observed that Plaintiffs would be significantly prejudiced if the Court had granted the motion to consolidate, that Defendants would be unduly benefitted at the expense of Plaintiffs, and that judicial economy would not be served by consolidating the subsequently filed actions with the instant action. This is especially the case in light of the most recent ruling of this Court dated December 10, 2002, and filed with the Clerk on December 11, 2002, which Movants were obviously not in possession of at the time they filed their Objection. Thus, the Objection should be overruled and the motion to consolidate denied.

Before commencing with argument on the merits supporting Magistrate Judge Sherman's November 20, 2002, Order denying the subject Motion to Consolidate, it is observed that none of the other named defendants IN THIS ACTION have filed any motions to consolidate of their own, any memoranda in support of Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D.'s Motion to Consolidate, or any objections to Magistrate Judge Sherman's November 20, 2002, Order denying the subject Motion to Consolidate of their own. (Emphasis supplied) By their silence; especially subsequent to the date the Order was issued by Magistrate Judge Sherman, this Court may certainly infer that they agree with Plaintiffs that there should not be a consolidation and acquiesce in the decision of Magistrate Judge Sherman to deny Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D.'s Motion to Consolidate.

On the other hand, whether or not the plaintiffs' counsel in the subsequently filed Chesher/Willenbrink Action filed objections to the attempt to consolidate being sought by Defendants in this action or for that matter, took any other action with respect to the motion to consolidate is irrelevant to the consideration of the motion. After all, unlike the attorneys representing parties named in the case at bar who have chosen not to join with Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D. in pursuing the subject Motion to Consolidate, they are not even attorneys of record in this action. They represent no party named in this action. Indeed, they would not appear to even have standing to support or oppose the subject motion in the absence of this Court allowing them to file a memorandum or motion in this case as an *amicus curiae* or otherwise by special permission.

Turning our attention to the merits of Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D.'s Objection, Plaintiffs posit that, contrary to Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Neyer, Jr., John S. Dowlin, and Todd Portune, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D.'s claim, Magistrate Judge Sherman did not ignore any facts pertinent to the subject motion to consolidate. He carefully considered all the facts and, after carefully considering all of the facts, denied the motion.

Consider the following:

1. Plaintiffs in this action do not yet know due to the current stage of the discovery in this action whether the exact same set of facts and circumstances - the alleged photography of the corpse of Perry Melton was by the same individual while his body was located at the Hamilton County morgue exists; has reasonable grounds to believe that the exact same set of facts and circumstances does not exist; and, challenge the defendants bringing the motion to produce evidence to support their contention that the photographs of Perry Melton were indeed the result of the exact same set of facts and circumstances as the subsequently filed action in the Willenbrink Action.

2. As a result of the most recent Order dated December 10, 2002, noted above, the Court in this action rejected pendent jurisdiction over the numerous state law claims and dismissed them without prejudice. Consequently, to the extent that such has not occurred in the Chesher/Willenbrink Action (a situation which may or may not exist but since no attorney in the Chesher/Willenbrink Action has ever served either of the undersigned with copies of any filings and the court obviously not serving the undersigned with anything issued by the Court in said proceeding since they are not of record in the Chesher/Willenbrink Action), the case at bar and the Chesher/Willenbrink Action are not similar in such respect.

3. Not being privy to the filings by the plaintiffs in the Chesher/Willenbrink Action, the undersigned are unable to state whether or not they are seeking the compensatory damages on the same legal grounds as those plaintiffs. For instance, defense counsel only refers to "compensatory damages for their alleged emotional distress..." while the undersigned herein have consistently made it clear that they also seek compensatory damages for Defendants' commercial exploitation/conversion of their property rights in their family member's photographs by government action without due compensation. To the extent that the plaintiffs in the Chesher/Willenbrink Action have not asserted such a claim, the instant case differs from the Chesher/Willenbrink Action.

4. As acknowledged by the defendants bringing the motion to consolidate, not all of the defendants in the Chesher/Willenbrink Action are named defendants in the instant action.

5. On the other hand, although not mentioned by the defendants bringing the motion to consolidate, none of the plaintiffs in the Chesher/Willenbrink Action are included in the instant action.

6. Finally, the fact that the plaintiffs' counsel in the Chesher/Willenbrink Action unilaterally and without consultation or permission by the undersigned indicated on the Civil Cover Sheet they filed in the Willenbrink action that they believed the present case to be "related" does not necessarily result in the same conclusion by the undersigned. Indeed, the undersigned assert that cases are unrelated in more ways than they are related. After all, they involve different plaintiffs and many different defendants.

With respect to the points raised by defense counsel in their Objection regarding Magistrate Judge Sherman's reliance on the several "significant procedural differences" that weighed against consolidation, Plaintiffs opine that they are indeed significant and legally sufficient to support an affirmation of his Order.

First, the consolidation of the Chesher/Willenbrink Action was evidently unopposed by counsel in said actions. The consolidation was not for the purpose of discovery only. There is no question that Chesher is intended to be a member of the class sought by the plaintiffs in the Willenbrink action. It is disingenuous on the part of the defendants who filed the subject motion to consolidate in this case to suggest otherwise.

Second, Magistrate Judge Sherman's observation that counsel for the named plaintiffs herein and counsel for the plaintiffs named in the Chesher/Willenbrink Action are different is not to be taken lightly. Taken alone, the defendants bringing the subject motion have a plausible argument. But, taken together with all of the other factors relied upon by Magistrate Judge Sherman, it is a legally significant and sufficient ground upon which to rely to support the Order entered by him.

Third, notwithstanding Defendants claims otherwise, the simple fact is that the cases are at different stages in many respects - discovery, rulings, motions pending, etc. The notion that the Chesher/Willenbrink Action Calendar Order may or may not be amended by the joint motion referred to by defense counsel (again, which was not mentioned or otherwise brought to the attention of the undersigned until review of the subject Objection by the undersigned) does not ameliorate the prejudice to Plaintiffs herein which would result if consolidation were ordered because the fact of the matter is that discovery, including but not limited to interrogatories and requests as well as depositions, is well on its way in the Chesher/Willenbrink Action, albeit, following a different path than that requested by the undersigned. In addition, there have been various motions filed in this action which may or may not have yet been filed in the Chesher/Willenbrink Action, there may have been various motions in the Chesher/Willenbrink

Action filed which may or may not have yet been filed in this action, there have been rulings on various motions in this action which may or may not have yet been addressed in the Chesher/Willenbrink Action, there may have been rulings on various motions in the Chesher/Willenbrink Action which may or may not have yet been addressed in this action, and so on.

Addressing the claim by defense counsel that "efforts were made by counsel for Defendants to include" the undersigned in discovery is misleading. First, defense counsel advised the undersigned that depositions were tentatively scheduled for a number of witnesses on the "merits" and it was their intention to have these depositions scheduled in the Chesher/Willenbrink Action be the depositions to be taken in the instant action. The undersigned objected on a number of grounds - the first of which was that they did not represent parties in the Chesher/Willenbrink Action and thus, it would be inappropriate for them to attend since they did not have standing in said action and had not noticed the depositions in the case at bar.

Further, the undersigned advised that they did not wish to begin depositions with those persons/parties identified by defense counsel. Rather, the intention was to begin depositions in the case at bar with the person who took the photographs of the corpse of Perry Melton and then continue with the depositions of those who were identified to be in the "chain of custody" of the subject photographs until such reached the studio of Defendant Condon where they were found by the police during a search of Defendant Condon's studio.

Nevertheless, defense counsel is choosing to ignore the proposed course of the depositions sought by the undersigned and seeks to unilaterally impose by extrajudicial decree without the benefit of any order from this Court that a witness over whom they have control shall only be produced once for both the Chesher/Willenbrink Action and the underlying action at a date and time and in an order of progression that counsel of record in the Chesher/Willenbrink Action and defense counsel decide and the requests of the undersigned will be ignored; all in the face of Magistrate Judge Sherman's Order denying exactly such a condition on depositions.

One must quaere, why should the undersigned's discovery course be dictated to them by defense counsel. Counsel in the Chesher/Willenbrink Action choose to start at the top, perhaps to then work their way down - with the exception of the depositions of Defendants Tobias and Condon which, as anticipated by the undersigned, pled the Fifth to all questions of substance germane to the merits of the action. Again, depositions at which the undersigned were not present or even advised that they were being scheduled until after all the arrangements were made. On the other hand, the undersigned choose to work from the bottom up. A discovery strategy which is so dissimilar that to force the undersigned to adopt the discovery strategy of the plainitffs' counsel in the Chesher/Willenbrink Action would prejudice the plaintiffs herein.

Additionally, the stage of "paper" discovery at the time defense counsel contacted the undersigned to attempt to force their inclusion in the depositions scheduled by defense counsel with the plainitffs' counsel of record in the Chesher/Willenbrink Action was decidedly different. In fact, it is still decidedly different at present. Although defense counsel made available, at the undersigned's clients' expense, a copy of the documentation produced in the Chesher/Willenbrink Action, such was provided only days before the deposition to which defense counsel referred was to take place. In addition, the discovery produced concerned other parties who have absolutely nothing to do with the instant action and caused Plaintiffs herein to incur unnecessary expense; to their prejudice.

In conclusion, Plaintiffs posit that consolidation of this action as requested by Defendants will have exactly the opposite effect than that which is sought by consolidation. Instead of furthering the interests of justice and promoting judicial economy, the opposite will result. Plaintiffs opine that the goals of consolidation; to wit, economy of time and effort for the court, for counsel, and for the litigants, will not be achieved by a consolidation of the other actions with this action. Plaintiffs contend that rather than further the interests of justice, consolidation shall actually serve to impede justice for them. Consolidation will cause them to be disadvantaged. Neither they nor their counsel should be compelled to suffer through hours of discovery not related to their claims. They should not be compelled to suffer through expensive and unproductive discovery; which has already occurred due to the production of documentation by defense counsel which clearly has nothing to do with their case *at plaintiffs' expense*. To continue to force such would be a disservice to Plaintiffs and cause them significant prejudice. Accordingly, Plaintiffs respectfully request that Defendants motion to consolidate by denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served on opposing counsel at their respective addresses by ordinary U.S. mail, postage prepaid, this 13th day of December, 2002.

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